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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Property Clause of the United States Constitution precludes the federal government from holding riparian water rights under state law in state jurisdictions that recognize such rights.

2. Whether the Desert Land Act of 1877 and other nineteenth century statutes bar the United States from asserting state-law riparian water rights, with respect to lands reserved for national forest purposes, in state jurisdictions that recognize such rights.

3. Whether the Organic Administration Act of 1897 precludes the federal government from obtaining water rights pursuant to state law for wildlife management purposes.

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OPINIONS BELOW

The opinion of the California Supreme Court (Pet. App. A1-A25) is reported at 44 Cal.3d 448, 243 Cal. Rptr. 887. The opinion of the California Court of Appeal (Pet. App. A28-A42) is reported at 187 Cal.App.3d 863, 232 Cal. Rptr. 208. The opinion of the California Superior Court (Pet. App. A43-A51) is unreported.

JURISDICTION

The judgment of the California Supreme Court was filed on February 18, 1988. A timely petition for rehearing was denied on March 16, 1988 (Pet. App. A27). The petition for a writ of certiorari was filed on June 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

1. In 1978, the California State Water Resources Control Board (Board) granted a petition requesting a determination of water rights in the Hallett Creek Stream System in Lassen County, California (Pet. App. A69). The United States submitted various claims on behalf of the Department of Agriculture's Forest Service seeking confirmation of water rights for the Plumas National Forest. The government claimed federal reserved water rights for firefighting and timber harvesting purposes (*id.* at A59).[1] In addition, the United States sought confirma-

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[1] Federal reserved water rights are created where the United States reserves lands under circumstances where waters are needed to achieve the primary purposes for which the reservation was created. As this Court explained in *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976):

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Such federal reserved water rights are wholly creatures of federal law—they are not dependent upon state law or state procedures. See 426 U.S. at 145. The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the primary purposes of the reservation. In *United States* v. *New Mexico*, 438 U.S. 696 (1978), this Court held that the reservation of land for a national forest reserves waters only for "primary" national forest purposes; namely, " '[t]o conserve the water flows, and to furnish a continuous supply of timber for the people' " (*id.* at 707 (citation omitted)). The United States must obtain the water needed for "secondary" national forest purposes as recreation and wildlife "in the same manner as any other public or private appropriator" (*id.* at 702).

tion of a riparian water right, under California state law,[2] in the amount of 1,500 gallons per day from a designated spring for future wildlife enhancement purposes (*ibid.*).[3]

The Board recognized a federal reserved water right entitling the Forest Service to divert and use water for fire-fighting and timber harvesting purposes (Pet. App. A59, A83). It rejected, however, the Forest Service's request for recognition of its asserted riparian right, concluding as a matter of law that the federal government is not entitled to riparian rights for national forest lands (*id.* at A59-A66).[4] The Board further concluded that, if the United States could validly claim riparian rights, the federal government here would be a holder of an "unexercised" riparian right (*id.* at A65).[5] The Board ruled that the unexercised riparian right, if it existed, should be limited to 500 gallons per day (*id.* at A67).

2. The United States, joined by the Sierra Club, filed a notice of exceptions in California Superior Court urging

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[2] California state law recognizes both riparian water rights and appropriative water rights. See *National Audubon Society* v. *Superior Court*, 33 Cal.3d 419, 441-445, 658 P.2d 709, 724-727, 189 Cal. Rptr. 346, 361-364, cert. denied, 464 U.S. 977 (1983).

[3] The federal government also made a claim for an additional amount of water from a different spring, but that claim was dismissed by the Board as speculative (Pet. App. A59). The United States did not seek review of that ruling.

[4] While the Board gave various statutory and policy grounds for this conclusion, it did not, contrary to petitioner's assertion (Pet. 3), deny the claim in whole or in part on the ground that "the United States constitutionally does not have the same 'riparian' rights as ordinary landowners." See Pet. App. A61-A65.

[5] Under California law, the exercise of previously-unexercised riparian rights may be subordinated to existing exercised riparian and appropriative water rights. *In re Waters of Long Valley Creek Stream System*, 25 Cal.3d 339, 358-359, 599 P.2d 656, 668-669, 158 Cal. Rptr. 350, 362-363 (1979).

that the federal government was entitled to an unexercised riparian water right. The superior court agreed (Pet. App. A43-A51), concluding that "because all property owners in California are entitled to riparian rights, the United States as a property owner of its reserved lands is also entitled to the same riparian rights" (*id.* at A50). The State of California appealed, and the California Court of Appeal largely affirmed the superior court's decision (*id.* at A28-A42). The court of appeal stated that it could "discern no justification for holding that riparian water rights inhere in some lands, but not in others, based solely upon the identity of the owner of the land" (*id.* at A38) and concluded that "the United States may assert the same proprietary interests, including a riparian water right, that a private individual could assert" (*ibid.*). The court of appeal qualified its ruling, however, by declaring that the riparian rights held by the United States under California law are subject to defeasance by subsequent appropriators (*id.* at A40-A42). The court of appeal interpreted the Desert Land Act of 1877, ch. 107, 19 Stat. 377 (Desert Land Act), and two other nineteenth century federal statutes (Act of July 26, 1866, ch. 262, 14 Stat. 253; Act of July 9, 1870, ch. 235, 16 Stat. 218), as subordinating nonreserved water rights to water rights subsequently perfected under state law by non-federal entities.[6] Thus, under the court of appeal's ruling, the Forest Service could validly claim riparian rights under California law, but any such rights so recognized were subject to defeasance by subsequent water users.

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[6] The court of appeal stated: "Pursuant to the Act of 1866, 1870 and 1877, the United States holds unreserved water on its lands open for the free appropriation and use of the public and its riparian right must be regarded as secondary to all other approved uses" (Pet. App. A42).

3. The United States, California, and the Sierra Club all filed petitions for review in the California Supreme Court, which were granted. That court, in a unanimous opinion (Pet. App. A1-A26), affirmed in part the court of appeal's decision. The court held that the United States has riparian water rights under California law on lands reserved for national forest purposes and that those rights are no more defeasible than the riparian rights of other California landowners (*id.* at A1).

First, the California Supreme Court rejected California's contention that the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, disqualifies the United States from holding property rights created by state law (Pet. App. A8-A11). California had argued that because the United States exercises sovereign powers over its lands by virtue of the Property Clause, it is therefore precluded from claiming the state-law rights of ordinary landowners. The California Supreme Court, relying upon this Court's decisions in *Kleppe* v. *New Mexico,* 426 U.S. 529, 540 (1976), and *Camfield* v. *United States,* 167 U.S. 518, 524 (1897), concluded that the United States may, in addition to its sovereign prerogatives, exercise the common law rights of an ordinary proprietor under state law. The California Supreme Court found this conclusion to be buttressed by this Court's decision in *United States* v. *New Mexico,* 438 U.S. 696 (1978), which had emphasized the congressional policy of deferring to state law in matters concerning the acquisition of water rights. The California Supreme Court stated that while the *New Mexico* decision addressed only appropriative rights—the only type of water right recognized under New Mexico law—"the underlying principle of deference to state law logically extends to *any* water right recognized under local law—including riparian rights" (Pet. App. A11 (emphasis in original)).

Second, the California Supreme Court rejected (Pet. App. A11-A19) California's contention that the Desert Land Act and the predecessor statutes, as construed by this Court in *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935), effected a relinquishment of all riparian rights of the United States. The California Supreme Court recognized that this Court's decision, which stated that a federal patentee had to look solely to state or local law to acquire water rights, neither held nor suggested that the federal statutes relinquished the federal government's riparian water rights in the lands which it had retained (Pet. App. A18). The California Supreme Court determined that neither Congress nor this Court has overruled the principle, "uniformly recognized" in state law, that the riparian rights inhere in federal lands "as surely as they inhere in private lands" (*ibid.*). The Court accordingly concluded that "under California law riparian water rights exist on federal lands located within the State of California" (*id.* at A19).

The court cautioned, however, that this conclusion does not mean that state-law riparian water rights claimed by the federal government are always superior to subsequent water rights claimed by other entities. Although the Desert Land Act and its predecessors did not *terminate* the federal government's interests in the waters on the public domain, it did *subordinate* those interests to the subsequent rights of entities claiming water under state or local law (Pet. App. A19). Hence, even though riparian rights attaching to the public lands still exist, such rights have no effect upon any party holding a valid, subsequent, state-recognized water right, be it riparian or appropriative in nature.

The court explained (Pet. App. A19-A22) that a different result obtains, however, when the federal lands in question are not public lands but, rather, lands that have

been withdrawn from the public domain and reserved for some particular purpose, such as a national forest. The Desert Land Act and its predecessors are, by their terms, applicable only to the "public lands" and not to "reserved lands" (*id.* at A19-A21, citing *Federal Power Comm'n* v. *Oregon (Pelton Dam),* 349 U.S. 435, 448 (1955), and *Cappaert* v. *United States,* 426 U.S. 128, 143-144 (1976)). Thus, those statutes do not subordinate the state-law riparian rights arising on reserved lands to subsequently-perfected competing claims. The California Supreme Court accordingly reversed the court of appeal's ruling that the state-law exercised riparian rights attaching to national forest lands are freely subject to defeasance by subsequent water claimants (Pet. App. A22).[7]

Finally, the California Supreme Court rejected as "unfounded" (Pet. App. A22) California's assertions that recognition of unexercised riparian rights in federal reserved lands would disrupt the settled rights of appropriators throughout California and impair the Board's ability to plan and manage the allocation of the state's water supply. The court pointed out (*id.* at A22-A25) that unexercised riparian rights in California, while they may not be abolished altogether, may be subordinated by the Board to all valid water rights currently being exercised. See *In re Waters of Long Valley Creek Stream System,* 25 Cal.3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979). Moreover, " 'the Board may make determinations as to the scope, nature and priority of the right that it deems reasonably necessary to the promotion of the state's interest in fostering the most reasonable and beneficial use

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[7] The court similarly rejected (Pet. App. A22) California's contention that the Organic Administration Act of 1897, 16 U.S.C. 473 *et seq.*, precluded the United States from asserting riparian rights with regard to national forest lands.

of its scarce water resources' " (Pet. App. A23 (emphasis omitted), quoting *In re Waters of Long Valley Creek Stream System,* 25 Cal.3d at 359, 599 P.2d at 669, 158 Cal. Rptr. at 362). Hence, should the Forest Service seek to exercise the unexercised riparian right claimed here, the Board could, upon appropriate findings, subordinate the exercise of that right to rights currently being exercised and could impose such limitations upon the scope, nature and priority of the exercise of that right as might be required to promote reasonable and beneficial use of the water.

ARGUMENT

The California Supreme Court's unanimous decision is correct and does not conflict with any decision of this Court, any federal court of appeals, or any other state court of last resort. To the contrary, it is fully consistent with this Court's recent decisions addressing the federal government's assertion of water rights on federal lands. Accordingly, the petition for a writ of certiorari should be denied.

1. California asserts (Pet. 12-17) that because the Property Clause invests Congress with "complete power" over the federal lands,[8] there is no room for the application of state law doctrines of riparian rights to such lands. This contention is meritless. The Property Clause does not preclude Congress from determining that the federal government shall acquire and hold water rights under state law on the same basis as private landowners. Indeed, Congress has long followed a general policy of deferring to

[8] The Property Clause provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * * " (U.S. Const. Art. IV, § 3, Cl. 2).

state laws in matters regarding water rights for federal lands. See *California* v. *United States,* 438 U.S. 645, 653, 662 (1978).

For example, this Court observed in *United States* v. *New Mexico,* 438 U.S. 696 (1978), a case involving the federal government's claim to water rights for national forest lands, that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law" (*id.* at 702 (footnote omitted)). The Court further explained (*ibid.*):

> Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

At bottom, California asserts the extraordinary proposition that the Property Clause, by giving Congress "complete power" over federal lands (Pet. 12), prohibits Congress from placing the United States in the same shoes "as any other public or private appropriator" (438 U.S. at 702). That proposition is not only at odds with common sense and Congress's century old practices, it is inconsistent with this Court's decisions. This Court has repeatedly stated that the United States possesses both sovereign powers and the rights of an ordinary proprietor with respect to sovereign lands. *Kleppe* v. *New Mexico,* 426 U.S. 529, 540 (1976); *Alabama* v. *Texas,* 347 U.S. 272, 273

(1954); *Sinclair* v. *United States,* 279 U.S. 263, 297 (1929); *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 474 (1915); *Camfield* v. *United States,* 167 U.S. 518, 524 (1897).

California's alternative constitutional argument, that Congress's power to reserve water on federal lands disqualifies the federal government from asserting "analog[ous]" riparian rights under state law (Pet. 15), is equally without merit. California cites no precedent in support of its proposition that the "reserved rights doctrine * * * is the constitutional analogue of the riparian doctrine" (*ibid.*). The absence of such authority is not surprising. Federal reserved rights and state riparian rights are completely independent concepts established by different sovereigns, created for different purposes, and administered under different standards. There is no reason why Congress's exercise of its plenary power under the Property Clause to reserve sufficient water to meet the primary purposes for which it has set aside public lands should disqualify Congress from allowing the government to rely on state law to meet "secondary" purposes. Indeed, the Court specifically recognized that federal reserved rights coexist with state water rights doctrines in *United States* v. *New Mexico,* when it stated that the federal government would acquire water for secondary purposes "in the same manner as any other public or private appropriator" (438 U.S. at 702).[9]

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[9] Seizing upon the Court's use of the word "appropriator," petitioner asserts (Pet. 16-17) that the *New Mexico* decision indicates that water rights for secondary national forest purposes can be attained only under the prior appropriation doctrine and not pursuant to other state-law water doctrines, such as riparian rights. But as petitioner acknowledges (Pet. 10 n.6), the State of New Mexico does not recognize riparian rights; hence, the Court simply used the terminology appropriate for that case. The California Supreme Court

2. California also contends (Pet. 8-9, 17-21) that the recognition of a state-law riparian right attaching to reserved federal lands would conflict with the policies embodied in the Desert Land Act and other nineteenth century statutes, which, the state claims, " 'severed' all federal property rights in water except as such rights are necessary to serve 'primary' reservation purposes" (*id.* at 17). California bases that position on this Court's decision in *California Oregon Power Co.* v. *Beaver Portland Cement Co., supra.* The Court held there that the Desert Land Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself" such that "a patent issued thereafter * * * carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed" (295 U.S. at 158). As a result, the patentee and subsequent grantees "take the legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location" (*id.* at 162). Thus, each state was left "to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain" (*id.* at 164).

California's reliance on *California Oregon Power Co.* is misplaced for at least two basic reasons. First, as the California Supreme Court explained (Pet. App. A17-A19), the State of California has chosen to retain the concept of riparian rights and has further determined, as a matter of state law, "that riparian rights exist in federal lands

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was manifestly correct in concluding that the "underlying principle of deference to state law logically extends to *any* water right recognized under local law—including riparian rights" (Pet. App. A11 (emphasis in original)). Deference is appropriate regardless of whether a state follows the prior appropriation doctrine, the riparian doctrine, or, as in California's case, a mixture of the two.

located in California as surely as they inhere in private lands" (*id.* at A18 (citations omitted)). Second, as that court also explained (*id.* at A19-A22), the Desert Land Act applies only to public domain lands. This Court has twice held—in *Cappaert,* 426 U.S. at 143-144, and *Pelton Dam,* 349 U.S. at 448—that the Desert Land Act and its predecessor statutes do not affect reserved lands, such as national forests, which have been withdrawn from the public domain. Since those Acts do not apply to reserved lands, it follows that they do not subordinate the state-law riparian rights attaching to such lands to subsequently perfected water rights (Pet. App. A20-A21).[10]

3. California also asserts (Pet. 22-23) that recognition of a state-law riparian right for wildlife purposes on national forest lands conflicts with the Organic Administration Act of 1897, 16 U.S.C. 473 *et seq.* (1897 Act). California observes that in *United States* v. *New Mexico, supra,* this Court supported its conclusion that no federal

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[10] California contends (Pet. 20-21) that the longstanding statutory construction established in this Court's rulings in *Pelton Dam* and *Cappaert* has been undermined by this Court's subsequent decision in *United States* v. *New Mexico, supra.* California incorrectly characterizes the latter case as creating an inference that the United States must acquire water for secondary reservation purposes solely by appropriation under state law, to the exclusion of state-law riparian rights. As we have explained, however, the only issue before this Court in *New Mexico* was whether the federal reserved rights doctrine was applicable to water required for secondary national forest purposes—no question concerning state-law riparian rights was before the Court in that case nor can anything in *New Mexico* reasonably be construed as casting doubt upon this Court's previous rulings concerning the application of the Desert Land Act and its predecessors to reserved lands. To the contrary, the congressional policy of deference to state water law endorsed by the Court in *New Mexico* militates in favor of such rights.

reserved rights exist for secondary national forest purposes, such as wildlife and recreation, on the basis that one of the purposes of the 1897 Act (which governed the establishment of the forest reserves) was to enhance the quantity of water that would be available to the settlers in the arid West. A federal reserved water right, the Court found, would tend to defeat that purpose (438 U.S. at 711, 713). California now asserts that a state-law riparian right for wildlife purposes would similarly defeat the objective of making water available to settlers.

The California Supreme Court correctly rejected that contention (Pet. App. A22). Indeed, the argument obviously proves too much. As this Court explained, the federal government is entitled to obtain water for secondary national forest purposes, such as wildlife consumption, provided that it does so pursuant to state law (*New Mexico,* 438 U.S. at 702).[11] The federal government is no less entitled to obtain that water if it chooses to invoke its state-recognized riparian rights rather than appropriative rights. While the exercise of those riparian rights on national forest lands may tend to decrease the total amount of water available to persons for other purposes, it is equally true that a similar diminishment would occur if the federal government obtained the water for that same purpose

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[11] By enactment of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.*, Congress directed that the purpose of the national forests shall include, among other things, preservation of wildlife. See *New Mexico,* 438 U.S. at 713-715. In addition, Congress has authorized the Forest Service to expend federal funds for the "investigation and establishment of water rights * * * necessary or beneficial in connection with the administration and public use of the national forests" (16 U.S.C. 526). Thus, there is no doubt that the Forest Service may assert water rights pursuant to state law for wildlife purposes. See *United States* v. *City & County of Denver,* 656 P.2d 1, 21-22 (Colo. 1982).

under the appropriative rights doctrine. California can hardly complain if its own laws give the federal government, along with other riparian landowners, the option of invoking riparian rights.

4. The California Supreme Court also correctly rejected (Pet. App. A22-A25) California's assertions that the recognition of a riparian right attaching to national forest lands would substantially disrupt existing patterns of water use in California. Under Article X, Section 2 of the California Constitution, water rights, including riparian water rights, are subject to the requirement of reasonable and beneficial use.[12] The riparian right at issue here, as a right claimed under state law, is subject to this requirement. Moreover, as pointed out by the California Supreme Court (Pet. App. A23-A25), the California Water Resources Control Board is entitled under California law to determine that an unexercised riparian right (such as the one claimed here) shall be subordinated to appropriative and riparian rights currently being exercised and, in addition, the Board may make such determinations as to the scope, nature and priority of the unexercised riparian right as the Board deems to be reasonably necessary to the promotion of the state's interests in foster-

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[12] Article X, Section 2 of the Constitution of the State of California provides in pertinent part:

> The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses.

ing the most reasonable and beneficial use of its water resources.

Finally, California asserts (Pet. 26) that recognition of a riparian right in favor of the United States would impair the administration of the State's appropriation process, which petitioner asserts is "the principal means by which the State plans and manages the allocation of its water supply." The same assertion, however, can be made with regard to riparian rights claimed by nonfederal entities. Unlike the many other western states that recognize only appropriative water rights, California recognizes both appropriative and riparian water rights. This being so, there is no credible reason why the United States should be uniquely disqualified from asserting riparian rights in that state. As the court of appeal stated (Pet. App. A38), there is "no justification for holding that riparian water rights inhere in some lands, but not in others, based solely upon the identity of the owner of the land."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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